92-815

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUIS E. FIGUEROA, Corporal,
United States Marine Corps,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the appropriate standard of review for an appellate court when reviewing a trial court's determination of whether a search authorization was lawfully issued?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Luis E. Figueroa, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on August 12, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Figueroa*, 35 M.J. 54 (C.M.A. 1992), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Figueroa*, No. 89 3902 (N.M.C.M.R. 1991), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on August 12, 1992. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

STATEMENT OF THE CASE

Petitioner was found guilty of one count of conspiracy to distribute cocaine, three counts of distribution of cocaine, one count of possession of cocaine with intent to distribute, and three counts of unlawful firearms transactions in violation of 10 U.S.C. § 881, 912a and 934, respectively. At trial, petitioner challenged the military base commander's authorization to search petitioner's and his family's on-base house. Petitioner argued, *inter alia*, that probable cause did not exist to believe that evidence of a crime would be found on the premises. The trial judge denied the suppression motion and allowed the government to admit into evidence cocaine found during the search. Thereafter, the military judge sentenced appellant to a dishonorable discharge, confinement for 10 years and forfeiture of all pay and allowances.

Upon subsequent review, in an unpublished opinion, the Navy-Marine Corps Court of Military Review affirmed the findings and sentence below. *United States v. Figueroa*, No. 89 3902 (N.M.C.M.R. May 15, 1991). The Navy-Marine Corps Court applied an abuse of discretion standard to review the trial judge's probable cause ruling. App. B, pp. 10a-11a. The court concluded that the trial judge's ruling was not "untenable or unreasonable." *Id.* at 11a.

On appeal, pursuant to 10 U.S.C. § 867(a)(3), the Court of Military Appeals affirmed appellant's conviction. *United States v. Figueroa*, 35 M.J. 54 (C.M.A. 1992). The court affirmed on the grounds that "the commander

had a substantial basis for concluding that probable cause existed to search appellant's quarters." App. A, p. 4a.

REASONS FOR GRANTING THE WRIT

A SPLIT AMONG VARIOUS CIRCUITS EXISTS OVER WHAT STANDARD OF REVIEW A COURT OF APPEALS SHOULD APPLY IN REVIEWING A TRIAL COURT'S DETERMINATION OF WHETHER A SEARCH IS LAWFUL.

"There is a conflict among the circuits concerning [what] the appropriate standard of review" is when reviewing a trial court's determination of whether a search was lawful. *United States v. Montilla*, 928 F.2d 583, 588 n.2 (2d Cir. 1991). As Judge Posner observed:

> [A] disagreement [exists] within the court over the standard for reviewing determinations of probable cause. A number of our decisions, as well as decisions in other circuits . . . hold or imply that such determinations, by whomever made, are to be reviewed *de novo*, that is, as if the reviewing judge or judges were the front-line judicial authority—the magistrate, or the trial judge, or the jury, that made the initial determination. . . . Judge Easterbrook and I have expressed our disagreement with that approach. . . . We think that the proper standard is the clearly-erroneous rule . . . .

McKinney, 919 F.2d at 418-19 (7th Cir. 1990) (Posner, J., concurring in result) (citations omitted).

Several circuits have adopted the clearly erroneous or substantial basis standard of review when reevaluating a lower court's determination of whether a seizure was lawful. *See, e.g., United States v. Faldiosera-Godinez*, 932 F.2d 1093, 1098 n.1 (5th Cir. 1991); *United States v. Rose*, 889 F.2d 1490, 1494 (6th Cir. 1989); *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989); *United States v. Teslim*, 869 F.2d 316, 321 (7th Cir. 1989); *United States v. Spears*, 965 F.2d 262, 269 (7th Cir.), *en banc reh'g denied*, 965 F.2d 282 (7th Cir. 1992). In so hold-

ing, these courts have based their reasoning upon this Court's pronouncement in *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983), *reh'g denied*, 463 U.S. 1237 (1984), that the question of probable cause is ultimately a question of fact, not a question of law. *Spears*, 965 F.2d at 269. Thus, as long as the reviewing court can find a substantial basis in fact that probable cause existed, the court should defer to the trial judge's ruling. *Id.* By applying the substantial basis test in this case, the United States Court of Military Appeals has joined this division. App. A, p. 4a.

In stark contrast to those decisions, a number of other circuits have applied a *de novo* standard of review. *See, e.g., United States v. McKinney*, 919 F.2d 405 (7th Cir. 1990);[1] *United States v. McKines*, 933 F.2d 1412, 1424-26 (8th Cir.), *cert. denied*, 112 S. Ct. 593 (1992); *United States v. Maragh*, 894 F.2d 415, 417 (D.C. Cir.), *cert. denied*, 111 S. Ct. 214 (1990); *United States v. Mines*, 883 F.2d 801, 803 (9th Cir.), *cert. denied*, 493 U.S. 997 (1990). These courts have based their reasoning upon this Court's holding in *Illinois v. Gates*[2] and the premise that the trial court's determination of whether probable cause existed to authorize a search is ultimately a question of law and thus subject to a *de novo* standard of review. *Montilla*, 928 F.2d at 588 n.2.

In *Spears*, the Seventh Circuit Court attempted to reconcile two sections set forth in the *Gates* opinion. *Spears*, 965 F.2d at 269.[3] The court based its holding upon the following language of this Court: "[W]e have repeatedly said that after-the-fact scrutiny by courts of the suffi-

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[1] In *United States v. Spears*, 965 F.2d 262, 270 (7th Cir. 1992), another panel of the Seventh Circuit questioned the standard used in *McKinney*. Rehearing *en banc* was denied by a divided vote of the Circuit Judges. *Id.* at 282.

[2] *See also United States v. Spears*, 965 F.2d 262, 270 (7th Cir. 1992) (providing a critical analysis of *United States v. McKinney*, 919 F.2d 405 (7th Cir. 1990)).

[3] The Seventh Circuit identified two standards of review for warrant/nonwarrant cases. *Spears*, 965 at F.2d 269, 271.

ciency of an affidavit [establishing probable cause] *should not take the form of de novo review.*" *Id.* (citing *Gates*, 462 U.S. at 263). Yet, as the Seventh Circuit Court of Appeals noted, several jurisdictions, including its own, have adopted either a *de novo* or substantial basis standard of review relying upon the Supreme Court's language in *Gates* providing that 'probable cause is a fluid concept . . . .' *Id.* This language suggests that, as the *McKinney* Court found, an appeals court should apply a less deferential standard of review, either a substantial basis or *de novo* standard of review. *Spears*, 965 F.2d at 270 (*Spears* criticizing the *McKinney* analysis). Different circuit courts have examined *Gates* and arrived at diametrically opposed interpretations. Only this Court can clarify *Gates*' effect on the proper standard of review. The Court should issue a writ of certiorari in order to resolve this split among the circuits.

In applying the substantial basis test, the courts below failed to apply the correct standard of review to the trial court's ruling. App. A, p. 4a; App. B, pp. 10a-11a. The appellate courts below should have reviewed the trial court's determination regarding the search issue *de novo*. This approach gives deference to the trial court's role as a fact-finder, but allows the appellate court to treat the important Fourth Amendment issue of probable cause as a question of law.

CONCLUSION

Petitioner asks the Court to resolve the issue of what standard of review an appeals court should apply in reviewing a trial court's determination of whether probable cause existed to authorize a search. In doing so, the Court will resolve the split among the circuits on this important question of law. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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November 10, 1992

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 66,996
NMCM 89 3902

UNITED STATES,
Appellee,

v.

LUIS E. FIGUEROA,
Corporal U.S. Marine Corps,
Appellant.

Argued Feb. 11, 1992

Decided Aug. 12, 1992

For Appellant: *Major Richard T. McNeil*, USMC (argued); *Captain M.K. Schaller*, USMC.

For Appellee: *Captain A. Diaz*, USMC (argued); *Colonel T.G. Hess*, USMC (on brief); *Commander Thomas W. Osborne*, JAGC, USN, and *Lieutenant Kirk A. Ludwig*, JAGC, USNR.

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer members convicted appellant, contrary to his pleas, of conspiracy to distribute cocaine, distribution of cocaine (3 specifications), possession of cocaine with intent to distribute, and three unlawful firearms transactions, in violation of

Articles 81, 112a, and 134, Uniform Code of Military Justice, 10 USC §§ 881, 912a, and 934, respectively. The approved sentence provides for a dishonorable discharge, confinement for 10 years, and total forfeitures. The Court of Military Review affirmed the findings and sentence in an unpublished opinion dated May 15, 1991. We granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS THE COCAINE SEIZED FROM APPELLANT'S QUARTERS.

On February 17, 1989, a Taurus .357 revolver was discovered by agents of the Naval Investigative Service (NIS) at the site of a suspected suicide aboard Marine Corps Base, Marine Corps Combat Development Command, Quantico, Virginia. On February 21, NIS Special Agent (SA) O'Connor obtained a Federal Firearms Record reflecting an over-the-counter sale of five handguns, including the one found at the suicide site, to Lance Corporal (LCPL) Walker. Another of the five handguns was found in LCPL Walker's quarters. In a sworn statement, LCPL Walker admitted purchasing the weapons and stated that he delivered four of them to appellant and kept the one found in his quarters. LCPL Walker told SA O'Connor that appellant "had agreed to erase the serial number from the weapons."

SA O'Connor discussed the case with a military lawler in the base legal office, who advised that there was probable cause for a search of appellant's quarters and personal automobile. SA O'Connor requested authority for the search from the base commander, supporting his request with an affidavit reciting the above information and LCPL Walker's sworn statement. SA O'Connor opined in his search request that the evidence indicated appellant's intent to circumvent the base order regarding registration of personal weapons.

Before taking his affidavit and request for search authorization to the base commander, SA O'Connor learned that appellant's car was not at his quarters, that a large amount of mail had accumulated in appellant's mail box, and that appellant apparently had not been in the quarters for several days. SA O'Connor did not give the base commander this information because he did not think it affected the probable-cause determination.

The base commander approved SA O'Connor's search request. NIS agents searched the quarters and did not find any guns, but found a small amount of cocaine instead. Appellant now contends, as he did before the Court of Military Review, that the search of his quarters was unlawful, so the cocaine involved in specification 5 of Charge II should have been suppressed as evidence. We disagree and affirm the decision of the Court of Military Review.

In resolving the granted issue, we must answer two questions: (1) do the facts related by SA O'Connor to the base commander constitute probable cause to search appellant's quarters? and (2) did SA O'Connor's failure to mention that appellant and his car apparently had been absent from the quarters for several days invalidate the search authorization?

Mil.R.Evid. 315(f)(2), Manual for Courts-Martial, United States, 1984, provides, "Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place . . . to be searched." In determining whether the base commander had probable cause to authorize the search of appellant's quarters, the question is "whether, given all the circumstances set forth in the affidavit before him, . . . fair probability" exists that the *weapons* [1] would

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[1] Drugs found in a search only for weapons may be seized without obtaining another authorization. *See United States v. Smeal*, 23 USCMA 347, 355, 49 CMR 751, 759 (1975).

be found in appellant's quarters. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Our duty as a reviewing court is to ensure that the commander "had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Id.* at 238-39, 103 S.Ct. at 2332, *citing Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960); *see United States v. Walters*, 22 USCMA 516, 518, 48 CMR 1, 3 (1973).[2]

Appellant argues that there was no probable cause for the search of his quarters because the information provided by SA O'Connor did not establish "a fair probability" that the handguns were located in the quarters. He points out that LCPL Walker did not report seeing the handguns in the quarters, and he did not report that appellant intended to store them in the quarters. Finally, appellant argues that the information was stale because, at the time of the search authorization, 1 week had passed since the handguns were last seen in his possession.

We hold that the commander had a substantial basis for concluding that probable cause existed to search appellant's quarters. The most logical place for appellant to store the weapons was either his quarters or his automobile. Since appellant was not likely to repeatedly risk detection by carrying contraband handguns in his automobile while traveling onto and exiting from the base,

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[2] The "substantial basis" test for reviewing a commander's probable cause determination has been used by this Court since *United States v. Penman*, 16 USCMA 67, 73, 36 CMR 223, 229 (1966). Based on the Supreme Court's language in *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983), several Federal appeals courts also have applied the "substantial basis" test, *e.g.*, *United States v. Edmonson*, 962 F.2d 1535, 1540 (10th Cir. 1992); *United States v. Brown*, 951 F.2d 999, 1002 (9th Cir.1991); *United States v. Day*, 949 F.2d 973, 977 (8th Cir.1991). At least one circuit has granted even greater judicial deference by adopting a "clear error" standard, *e.g.*, *United States v. Spears*, 965 F.2d 262 (7th Cir.1992).

the most logical place to look for them was in his quarters. *See United States v. Barnard*, 23 USCMA 298, 302, 49 CMR 547, 551 (1975) (living quarters and locker at work station were "two logical and reasonable places" to conceal stolen jewelry); *United States v. Walters*, *supra* ("logical to reason" that accused hid stolen property in his wall locker); *United States v. Sparks*, 21 USCMA 134, 136, 44 CMR 188, 190 (1971) ("most logical place" to search for stolen camera and coat was accused's quarters). Although the weapons had not been seen for a week, there was no indication that he had removed them from the base or otherwise disposed of them.

We turn finally to the question whether omission of information indicating appellant's extended absence from his quarters invalidated the search authorization. We hold that it did not.

Although *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and Mil.R.Evid. 311(g)(2) deal with misrepresentations and do not specifically address omissions, we believe that omissions of information should be analyzed in the same manner as misrepresentations. *See United States v. Ippolito*, 774 F.2d 1482, 1486-87 and n.1 (9th Cir.1985); *United States v. Martin*, 615 F.2d 318, 328-29 (5th Cir.1980); *United States v. House*, 604 F.2d 1135, 1141 n. 9 (8th Cir.1979), *cert. denied*, 445 U.S. 931, 100 S.Ct. 1320, 63 L.Ed.2d 764 (1980). Omissions do not "undermine probable cause" unless they are intentional or made "with reckless disregard for the" accuracy of the information. Merely "negligent omissions" do not "undermine" probable cause. *United States v. Martin*, 615 F.2d at 329.

We are satisfied, as was the court below, that SA O'Connor did not deliberately mislead the commanding officer. Furthermore, even if he had intentionally or recklessly omitted the additional information, it "would not have extinguished probable cause." *United States v. Tham*, 948 F.2d 107, 1111 (9th Cir.1991) (footnote omitted).

The decision of the United States-Navy Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX and CRAWFORD concur.

WISS, Judge (concurring in the result):

The majority opinion states, "Our duty as a reviewing court is to ensure that the commander 'had a "substantial basis for . . . conclud[ing]" that probable cause existed.'" 35 MJ at (55-56). The case cited as authority for this standard of review is *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332-33, 76 L.Ed.2d 527 (1983), which does hold that, where a search is pursuant to a magistrate's warrant, an appellate court properly ought not determine probable cause *de novo* but, rather, ought to limit itself to determining whether the magistrate had a "substantial basis" for the probable-cause determination.

Where, however, the search is without a warrant, Federal courts have not been so distant in reviewing the existence of probable cause to support the search. Instead, in non-warrant cases, an appellate court properly can determine for itself, *de novo*, whether there was probable cause. *See, e.g., United States v. McKinney*, 919 F.2d 405 (7th Cir.1990).* *See also United States v. Straughter*, 950 F.2d 1223 (6th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 1505, 117 L.Ed.2d 643 (1992); *United States v. Uribe-Velasco*, 930 F.2d 1029 (2d Cir.1991). I believe the same rationale for differentiating between the two standards of review that is fully set out in *McKinney* applies, as well, in the military.

The difficulty, though, is that a search pursuant to a military commander's authorization is neither a warrant

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* In *United States v. Spears*, 965 F.2d 262, 270 (7th Cir.1992), another panel of the 7th Circuit questioned the standard used in *McKinney*. Reconsideration *en banc* was denied by a divided vote of the Circuit Judges. *Id.* at 282.

search nor a warrantless search. I believe that, after carefully considering the rationale behind the two different appellate standards of review, the standard for review of a commander's search authorization ought to parallel the decision as to whether the commander's authorization is entitled to the good-faith exception. *See United States v. Lopez*, 35 MJ 35, 49 (CMA 1992) (Wiss, J., concurring in the result).

From my viewpoint, then, if the situation is such that the commander could be the subject of a good-faith exception because the commander fulfilled the Supreme Court's expectations of "neutral judicial officers . . . [with] no stake in the outcome of particular criminal prosecutions," *see United States v. Leon*, 468 U.S. 897, 917, 104 S.Ct. 3405, 3417, 82 L.Ed.2d 677 (1984), then I will review the commander's probable-cause determination on the substantial-basis standard. That is the standard of review to which such judicial officers' determinations are entitled. *See Illinois v. Gates, supra.*

On the other hand, if the realistic view of the commander reflects someone who—though qualified to have issued the authorization under *United States v. Stuckey*, 10 MJ 347 (CMA 1981)—does not conform to the *Leon* majority's vision of an official whose authorizations are entitled to be executed in reasonable good faith, then I will review that commander's probable-cause finding less deferentially in the nature of a *de novo* review.

Under the circumstances of this case, I am satisfied that execution of this commander's authorization would have been entitled to the good-faith exception, so I agree with the majority's limited standard of review—and, as well, with the majority's application of that standard here.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 Stovall Street
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IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

E. M. ALBERTSON
WALTER J. LANDEN, SR.
T. A. LAWRENCE

UNITED STATES

v.

LUIS E. FIGUEROA, 067 60 8811
Corporal (E-4), U.S. Marine Corps

NMCM 89 3902 Decided 15 May 1991

Sentence adjudged 7 July 1989. Military Judge: E. D. Clark. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Marine Corps Combat Development Command, Quantico, VA 22134-5000.

Capt M. K. SCHALLER, USMC, Appellate Defense Counsel.

LT ROBERT E. WALLACE, JAGC, USNR, Appellate Defense Counsel.

LT KIRK A. LUDWIG, JAGC, USNR, Appellate Government Counsel.

PER CURIAM:

A general court-martial composed of officer members found appellant guilty of possessing, distributing and conspiring to distribute cocaine on various occasions, and of unlawfully purchasing and dealing in weapons. Appellant received a sentence of 10 years confinement, total forfeitures and a dishonorable discharge.

Appellant argues that the Government obtained evidence of one of his drug possessions as a result of an illegal search of his on-base quarters. He also argues that the Government failed to rebut his defense of duress, and finally, that his sentence is too severe in light of his personal circumstances.

I

On 15 February 1989, a LCPL Walker bought four handguns for appellant and four for himself. Walker and appellant returned to Walker's barracks and did not register the guns with base security as required. Appellant paid Walker for his four guns and promised to take the serial numbers off the guns. In the course of a homicide investigation, an agent of the Naval Investigative Service (NIS) discovered the weapon that killed the victim was one of the guns Walker gave appellant on 15 February. Walker told NIS about the guns and that he believed appellant was going to sell the guns. Appellant's only known living quarters were on base.

The investigating agent prepared an affidavit listing the above facts and requesting authorization to search appellant's car and quarters. The agent signed the affidavit and received advice from the base legal officer that there was probable cause for the search. Before taking the affidavit to the base commander, the agent learned appellant's car was not at appellant's quarters, that there was a "voluminous" amount of mail overflowing appel-

lant's mail box, and that appellant probably had not been in the quarters recently. The agent did not tell the base commanding general about these observations, and was of the opinion that the base commander was presented with all evidence pertinent to the search authorization. The base commander authorized the search. While searching appellant's quarters, NIS did not find any guns, but did find a small amount of cocaine.

II

At trial, the military judge denied a motion to suppress the cocaine found in the quarters. The judge also found that under the totality of the circumstances it was reasonable to believe the remaining three guns appellant received on 15 February were in his quarters on 22 February and that there was probable cause to search appellant's quarters. If there was probable cause for the search authorization, the search was lawful and there is no need to examine the "good faith" exception to the exclusionary rule. Military Rules of Evidence (Mil.R. Evid.) 311(b)(3), 315(a), Manual for Courts-Martial (MCM), United States, 1984. Probable cause exists if there is a reasonable belief that the evidence sought is in the place to be searched. Mil.R.Evid. 315(f)(2). The Supreme Court has also defined probable cause as a fair probability the evidence sought will be found in a certain place. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983).

As with all Fourth Amendment search questions, the key issue is whether the search was reasonable under the totality of the circumstances. *Id.*, *United States v. Tipton*, 16 M.J. 283 (C.M.A. 1983). The military judge's finding tnat it was reasonable and there was probable cause to search appellant's quarters is reviewed on an abuse-of-discretion standard. *See United States v. Thompson*, 30 M.J. 577, 579 (A.C.M.R. 1990); *United States v. Akers*, 19 M.J. 733 (A.F.C.M.R. 1984), *pet. denied*, 20

M.J. 133 (C.M.A. 1985). An abuse of discretion is a clearly untenable decision amounting to a denial of justice. *United States v. Travers*, 25 M.J. 61 (C.M.A. 1987); *Thompson*, 30 M.J. at 579.

Based on our review of the facts, we cannot say that it was untenable or unreasonable to believe appellant was storing unregistered weapons in his quarters or his car. The last time the guns had been seen was a week earlier when appellant had them on base. His only known quarters were on base. He had transferred one of the guns to another Marine on base. The fact that he apparently had not been at his quarters for several days does not exclude the possibility that he stored the guns there before leaving the area. It is not unreasonable to believe appellant would store these valuable items in a secure place such as his quarters or his car. A person's living area is a most likely place to contain evidence or fruits of a crime. *United States v. Bernard*, 23 U.S.C.M.A. 298, 49 C.M.R. 547 (1979). It was not unreasonable to believe the guns could still be in appellant's quarters, therefore there was probable cause to authorize the search.

III

Appellant also argues that the search authorization was rendered invalid by the investigating agent's failure to inform the base commander of the appearance of appellant's quarters and absence of his car. Appellant relies on a case where the Supreme Court invalidated a search warrant issued on the basis of false information provided in an affidavit. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1975). Although there was no false information provided in this case, appellant argues that the investigating agent misled the base commander into believing appellant was living at his quarters when the search authorization was issued.

There is no evidence that Agent O'Connor deliberately attempted to mislead the commanding officer. He testified

that he thought he provided all the pertinent information. His innocent mistake or even negligent act of failing to include evidence of the appearance of appellant's quarters in his affidavit is not enough to invalidate the search authorization. *See Franks*, 438 U.S. at 171, 57 L.Ed.2d at 682. Even intentionally false or omitted facts may not invalidate an authorization based in part on those facts if the remaining facts provide a sufficient basis for the facts were not false, but were omitted. The question becomes whether there would have been a reasonable basis for finding probable cause if the affidavit had contained the information on the appearance of appellant's quarters. As stated above, just because appellant had not been seen at his quarters recently does not mean that he did not have the guns in his quarters. We find no substantial probability that the base commander would have refused to authorize the search had she known the appearance of appellant's quarters. It is still reasonable to believe appellant may have stored the weapons in his quarters.

IV

Appellant also claims the Government failed to rebut his defense of duress. At the time of these offenses, appellant's wife and infant son were critically ill with AIDS. He also has AIDS and was preparing to be medically discharged. Appellant claims that he was forced to commit these crimes in order to raise enough money to continue his family's medical treatment once he was discharged. Although we sympathize with appellant's personal situation, this argument has no merit. There is no evidence that appellant's wife and son would immediately suffer death or serious harm unless appellant began selling cocaine and weapons. Rule for Courts-Martial 916(h), MCM. There is no evidence that his wife and son were in immediate danger of having their medical care cut for nonpayment of bills. Several weeks before these offenses, appellant and his wife heard various medical officials discuss arrangements for continuing his family's

freed medical care after appellant received his discharge. Although he claims this treatment was not a sure thing, he admitted this future care was a possibility.

Even if appellant's family had been in immediate danger of losing their required medical care due to a lack of money, there is no evidence that he had no other option but to sell cocaine and weapons. Appellant was aware of many governmental agencies available to offer assistance, but claimed this was not an option because they refused to help him. These programs were unable to provide assistance while appellant was still receiving a paycheck and his family was still receiving treatment through the military. There is no evidence that this assistance would not have been available once he was released from active duty.

These offenses occurred when appellant was in a period of uncertainty over when he was to be discharged, what type of discharge he would receive, and what type of benefits and financial assistance would be available for him and his family once he was discharged from the Marine Corps. Instead of waiting to resolve these questions, appellant chose to commit these offenses long before there was any danger of his family losing its medical care. The offense of duress does not lie under these circumstances.

V

Appellant's last assignment of error is that his sentence of 10 years confinement, total forfeitures and dishonorable discharge is inappropriate based on his circumstances. His wife died shortly after his trial, and his son was in critical condition in the final stages of AIDS. At the time of his trial, appellant also had a life expectancy of less than five years. He also has one surviving stepson. Appellant grew up in a crime-ridden area of New York City, and prior to the two-month period of these offenses he had a spotless criminal and disciplinary record.

These facts, however, do not excuse appellant's decision to become a true dealer in death. His decision to begin selling crack cocaine in Quantico, Virginia, allowed Marines and others to become involved with an extremely addictive drug form. He became involved in illegal weapons distributions that provided the means for potential violence. In fact, one weapon was involved in the death of a young Marine.

Despite appellant's personal unfortunate circumstances, we find the sentence appropriate. We affirm the findings and sentence approved on review below.

E. M. ALBERTSON, Senior Judge

WALTER J. LANDEN, SR., Judge

T. A. LAWRENCE, Judge

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No. 92-815

In the Supreme Court of the United States

OCTOBER TERM, 1992

LUIS E. FIGUEROA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an appellate court should exercise de novo review in determining whether there was probable cause for a warrant-authorized search.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-7a, is reported at 35 M.J. 54. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 8a-14a, is unpublished.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 12, 1992. The petition for a writ of certiorari was filed on November 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Quantico, Virginia, petitioner, a member of the United States Marine Corps, was convicted on one count of conspiring to distribute cocaine, on three counts of distributing cocaine, on one count of wrongfully possessing cocaine with the intent to distribute it, and on two counts of wrongfully purchasing and engaging in the business of dealing in firearms, in violation of Articles 81, 112a, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881, 912a, and 934. He was sentenced to confinement for ten years, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. The Court of Military Appeals granted discretionary review of petitioner's case and affirmed.

1. At trial, petitioner moved to suppress a quantity of crack cocaine seized during a search of his on-base home by Naval Investigative Service (NIS) agents. Pet. App. 2a-3a. The commanding general of the base authorized the search after determining there was probable cause to believe that petitioner had stored in his home several handguns that had been purchased in violation of federal law and that petitioner had failed to register the weapons as required by base regulations. *Ibid.*[1] The trial judge denied petitioner's motion.

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[1] Military law authorizes a military commander with "control over the place where the property or person to be searched is situated or found" to authorize a search of such a place. Mil. R. Evid. 315(d). Before authorizing such a search, the commander must have information to support "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." Mil. R. Evid. 315(f)(2). In petitioner's case,

2. On appeal, the court of military review, Pet. App. 9a-11a, and the Court of Military Appeals, *id.* at 2a-7a, upheld that decision. The Court of Military Appeals explained that the relevant inquiry is whether "the commander had a substantial basis for concluding that probable cause existed to search [petitioner's] quarters," a standard of review that did not contemplate de novo review of the commander's judgment. *Id.* at 4a.

ARGUMENT

Petitioner claims that the court below applied the wrong standard of review with respect to the probable cause issue. He contends that the Court of Military Appeals should have reviewed the commander's probable cause determination de novo and that there is a split among the circuits on that issue. That claim does not warrant review by this Court.

The standard of review applied by the Court of Military Appeals is fully consistent with this Court's decisions. This Court has repeatedly counseled reviewing courts against engaging in an after-the-fact, de novo scrutiny of probable cause determinations in cases involving a warrant-authorized search. In order to encourage resort to the warrant process, the Court has emphasized that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983) (quoting *Jones* v. *United States*, 362 U.S. 257, 271 (1960)); accord 462 U.S. at 250 (White, J., concurring in the judgment); *New York* v. *P.J. Video, Inc.*, 475 U.S. 868, 876 (1986); *Massachusetts* v. *Upton*, 466 U.S. 727, 728, 732-733 (1984); see *United States* v. *Leon*, 468 U.S. 897, 915 (1984).

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that information included the sworn statement of petitioner's coconspirator along with an affidavit from the investigating agent. Pet. App. 2a.

In this case, the search of petitioner's home was conducted pursuant to a search authorization issued by the base commander. See Mil. R. Evid. 315(d). Under military law, a base commander serves the same role that would be filled by a magistrate in the civilian community, because a base commander must be able to ensure the safety and security of all personnel on a military base. In reviewing the base commander's action, the Court of Military Appeals applied the standard of review described in *Gates* and therefore applied the standard mandated by this Court.

The cases that petitioner cites are inapposite. Most of the cases cited by petitioner deal with the very different question whether the defendant was "seized," within the meaning of the Fourth Amendment, during an encounter with the police.[2] That issue is not presented in this case.[3]

The two Seventh Circuit decisions that petitioner cites address the question whether the "substantial basis" test described in *Illinois* v. *Gates* is the appropriate

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[2] Some circuits have held that the question whether a person has been seized is a mixed question of fact and law that is subject to de novo review on appeal. See *United States* v. *McKines*, 933 F.2d 1412 (8th Cir.) (en banc), cert. denied, 112 S. Ct. 593 (1991); *United States* v. *Montilla*, 928 F.2d 583, 588 (2d Cir. 1991); *United States* v. *Maragh*, 894 F.2d 415, 417-418 (D.C. Cir.), cert. denied, 111 S. Ct. 214 (1990). Other circuits have held that this issue is a question of fact subject only to the clearly erroneous standard of review. See *United States* v. *Valdiosera-Godinez*, 932 F.2d 1093, 1098 n.1 (5th Cir. 1991); *United States* v. *Rose*, 889 F.2d 1490, 1495 (6th Cir. 1989); *United States* v. *Gray*, 883 F.2d 320, 322 (4th Cir. 1989); *United States* v. *Teslim*, 869 F.2d 316, 321 (7th Cir. 1989).

[3] *United States* v. *Mines*, 883 F.2d 801 (9th Cir.), cert. denied, 493 U.S. 997 (1989), on which petitioner relies, deals with another quite different question—the standard of reviw for determinations of the scope of a defendant's consent to search. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

standard of review to determine whether there was probable cause or whether a "clearly erroneous" standard should be applied. In *United States* v. *McKinney*, 919 F.2d 405 (7th Cir. 1990), the court applied the "substantial basis" test in the case of a warrant-authorized search—the same standard that was applied by the Court of Military Appeals in this case. In *United States* v. *Spears*, 965 F.2d 262 (7th Cir.), cert. denied, 113 S. Ct. 502 (1992), a different panel of the Seventh Circuit rejected the "substantial basis" test in favor of the "clearly erroneous" standard. The difference between the "clearly erroneous" and "substantial basis" formulations may be the same as the difference between dusk and twilight (Judge Posner made essentially that point in *McKinney*, 919 F.2d at 421 (concurring opinion)). In any event, neither formulation aids petitioner, since both cases clearly rejected the de novo standard of review that he endorses. *E.g.*, *Spears*, 965 F.2d at 270-272, 277. Accordingly, the decision below does not conflict with the Seventh Circuit cases that petitioner cites. His claim warrants no further review.[4]

[4] If petitioner's claim is that each appellate court must assess de novo whether a substantial basis existed for finding probable cause, *McKinney*, 919 F.2d at 408 n.2, then his petition should be denied, since the Court of Military Appeals' decision is fully consistent with that standard of review. See Pet. App. 3a-5a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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